of the assignment in question to the appellant, or to any one for her benefit. The circuit court, therefore, did not err in holding that the transfer of the policy to W. S. Lurty was to be preferred in equity and right to the alleged assignment thereof to appellant, and its decree must be affirmed.

Note.

As was said by the court in this case "there is nothing more common in the business life of the present day than the assignment of insurance policies as collateral security for borrowed money," and hence the importance of this decision, not because it announces any new doctrines, but because it deals so clearly with one of the daily transactions of life that it can be easily grasped by the lay mind. In taking the assignment of an insurance policy, this case decides, it is always safer to take an actual and physical, as distinguished from a constructive delivery of the policy, so as to put it out of the power of the assignor to revoke it; and due notice of this assignment, acknowledged before a notary public, should be given in writing to the company, and recognized and accepted by it in writing. The only evidence that the unsuccessful appellant had of her right and title to the proceeds of the policy was a written assignment thereof in the handwriting of the insured, found amongst his papers after his death. The court said: "The paper relied on as an assignment was kept within its author's own knowledge and within his own exclusive power and control. There was never a moment that appellant had any power or control over the papers."

See note to Johnson *v.* Alexander, 9 L. R. A. 660.

CHESAPEAKE & O. RY. CO. *v* ADM'R.

Nov. 21, 1907.

[59 S. E. 398.]

1. Carriers—Injury to Person Assisting Passenger.—A person accompanying passengers to assist them in entering a train, though not a passenger, is not a trespasser, nor bare licensee, as he has at least a tacit invitation from the carrier by virtue of the relation between it and the passenger, and the carrier must exercise at least ordinary care to avoid injuring him by defective stational facilities or approaches thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1242.]

2. Same—Persons Assisting Passenger—Duty to Hold Train Until They Have Disembarked—Notice of Intent.—Though a person assisting a passenger in boarding a train has a right to enter the train in conformity with a practice acquiesced in by the carrier, he should inform those in charge of his purpose; and, where they have no actual

or constructive notice that he intends to disembark, they are not bound to hold the train, nor to notify him before it starts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1242.]

3. Same—Injury to Person Alighting from Train—Negligence.—Where a brakeman in good faith makes an unsuccessful attempt to prevent one who had assisted a passenger to board a train from alighting after it had started, the railroad is not liable for the person's injury, although he might have alighted in safety had the brakeman not interfered; the brakeman's act being one in an emergency, which will not create a liability on the master's part, though the result shows it to have been a mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1121, 1242.]

Error to Circuit Court, Augusta County.

Action for the death of his intestate by the administrator of James R. Paris against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. L. Parrish, for plaintiff in error.
Charles Curry and *Peyton Cochran,* for defendant in error.

WHITTLE, J. The plaintiff in the circuit court (defendant in error here) brought this action to recover damages for the death of his intestate, James R. Paris, alleged to have been caused by the negligence of the plaintiff in error, the Chesapeake & Ohio Railway Company.

Treating the case as upon a demurrer to the evidence, the essential facts are as follows: The intestate, who at the time of the accident was 76 or 77 years of age, accompanied his daughter, an intending passenger, from their home in Staunton, Va., to the company's station in that city. On the arrival of the train the conductor and brakeman, as usual, stationed themselves at the front end of the rear coach to assist passengers in leaving and entering the cars. The intestate escorted his daughter into the rear car, carrying her hand baggage, and secured a seat for her about midway the coach. The train crew did not know, and there was nothing to lead them to suspect, that he was not a passenger, or that he intended to get off. That he had ample time, in the exercise of ordinary care, to have left the trian in safety, is shown by the circumstances that it remained at the station five minutes, two minutes longer than the regulation stop, and that the conductor, after giving the leaving signal, boarded the train and went into the forward car to take up tickets before the intestate appeared on the front platform of the rear coach.

The account given by some of the plaintiff's witnesses of occurrences at the moment of the accident is that while the intestate was descending the steps the train was put in motion, and thereupon he was seized from behind by a brakeman on the platform of the car; that he turned his head and looked at the brakeman, and then either broke his hold or was turned loose and fell to the station platform below, and rolled thence under the moving train, between the rail and platform, and was struck by the step on the rear end of the coach and fatally injured. Though several witnesses expressed the opinion that the intestate could have alighted in safety, but for the interference of the brakeman, there is no suggestion that the latter was not acting in good faith in his effort to rescue the intestate from the peril of jumping off the moving train.

The rule of law regulating the duty of a railway company to persons coming to stations to assist passengers is correctly stated in 2 Hutchinson on Carriers (3d Ed.) § 991: "A person who comes to a railroad station to assist passengers in entering or leaving the train, though not a passenger, is not a trespasser, as he comes with at least the tacit invitation, of the carrier. While so engaged he does not stand in the relation to the carrier of a bare licensee, but if deemed to have been invited to be there by virtue of the relation existing between the carrier and the intending or arriving passenger. The carrier, therefore, owes to him the duty of exercising at least ordinary care to see that he is not injured by reason of defective stational facilities or approaches thereto.

"So one who goes on a train to render necessary assistance to a passenger, in conformity with a practice approved or acquiesced in by the carrier, has a right to render the needed assistance and leave the train; and the carrier, in permitting him to enter with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. * * * But the duty of the carrier in this respect is dependent upon the knowledge of such person's purpose by those in charge of the train; for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to move after giving him a reasonable time to get aboard. He should, accordingly, notify some one in the management of the train of his presence, business, or purpose, so as to create some relation to the carrier, and thus make it its duty to care for him; and when the carrier's servants have no knowledge, or there are no circumstances tending to put them on notice, that a person who has boarded a train to assist another intends to alight before the train starts, they are not bound to hold the train until he has had time to disembark, nor to notify him before the train has started." See, also, Shearman & Redfield on Neg. (5th

Ed.) § 492a; Little Rock, etc., Ry. Co. *v.* Lawton, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48, and notes.

Applying these just rules to the facts of this case, it is clear that the plaintiff has wholly failed to fix actionable negligence on the defendant company. It was the brakeman's duty to have endeavored to protect the intestate from danger incident to his stepping off a moving train, and if, perchance, disaster attended his efforts in that regard, the master cannot be held answerable in damages for the fortuitous result.

"One who, by his own negligence, has placed another in an emergency cannot require of that other the wisest possible action in order to save him from the consequences of his own fault." Wise Ter. Co. *v.* McCormick, 104 Va. 400, 51 S. E. 731.

We are of opinion that the judgment complained of should be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.

Note.

Duty of Carrier to Persons Assisting Passengers.

The question decided in this case is of unusual interest to the general public, and is one of first impression in this state. The ruling of the court is clearly supported by the weight of authority.

It is a matter of common knowledge, that in the usual conduct of the passenger business, it often becomes necessary for those not passengers to go upon the cars to assist incoming as well as outgoing passengers, and that a practice has grown up in response to this necessity. Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 29 Am. St. Rep. 48, 51, 15 L. R. A. 434.

This has been facetiously called the doctrine of the right to "welcome a coming or speed a departing guest." See Yarnell *v.* Kansas City, etc., R. Co. (Mo.), 18 L. R. A. 599, 601.

General Rule as to Degree of Care.—A person who goes on the premises of a common carrier to meet a friend or to see him off, or, as it is aptly expressed, to welcome a coming or speed the parting guest, is not a trespasser, and the company owes him the duty of reasonable and ordinary care; that is, such care and prudence as an ordinarily prudent person would have exercised under the same or similar circumstances for his safety; its duty to him is not that due to a passenger, namely, the highest degree of practicable care. Railroad Co. *v.* Perry, 88 Ky. 10; Hamilton *v.* Railroad Co., 64 Tex. 251; McKone *v.* Railroad Co., 57 Mich. 601, 47 Am. Rep. 596; Doss *v.* Railroad Co., 59 Mo. 27; Gillis *v.* Railroad Co., 59 Pa. St. 143, 98 Am. Dec. 317; Danville R. Co. *v.* Brown, 18 S. E. 278; Railway Co. *v.* Best, 66 Tex. 117, 18 S. W. 224; Railway Co. *v.* Reich (Tex. Civ. App.), 32 S. W. 819; Gulf, etc., R. Co. *v.* Williams (Tex. Civ. App.), 51 S. W. 653; International, etc., R. Co. *v.* Satterwhite, 15 Tex. Civ. App. 102, 38 S. W. 102; Griswold *v.* Chicago, etc., R. Co., 64 Wis. 652, 26 N. W. 101; Lucas *v.* New Bedford, etc., R. Co., 6 Gray 64, 66 Am. Dec. 406; Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905; Dillingham *v.* Pierce (Tex. Civ. App.), 31 S. W. 203, 206.

A person who enters a railway car merely as the necessary escort of a passenger, with the knowledge of the trainmen, enters upon an implied invitation, which entitles him to ordinary care from the car-

rier, and to recover for any injury caused by its omission; but he cannot recover unless he proves that the injury was caused by the negligence of the carrier. Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 29 Am. St. Rep. 48, 15 L. R. A. 434.

If a person who visits a railroad train to welcome a coming guest, or speed a parting one, is held to have claims on the railroad company for ordinary care, surely one who attends a female passenger, encumbered with an infant and a satchel, is entitled to hold the company to equal responsibility. Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am Rep. 371, 377.

Cases in Which the General Rule Has Been Applied.—In an action against a railroad company for personal injuries, the evidence showed that plaintiff went upon the train to accompany his wife and child; that when the conductor called, "All aboard," he started to leave the train, but found the door of the vestibule locked; that the brakeman first told him he could not get off, and that it would break his neck, but afterwards said to him, "You get off," and opened the door, which he shut again as soon as plaintiff had passed through it to the platform steps. Plaintiff jumped from the train, and was injured, the train then being in rapid motion. Held, that the evidence justified a verdict for plaintiff. Galloway *v.* Chicago, etc., R. Co. (Iowa), 54 N. W. 447.

Where a lady passenger is accompanied by a little girl and encumbered with hand baggage and parcels which she cannot unaided place promptly and safely upon the train, and consequently has to procure the aid of another in carrying her baggage aboard, such other person has a right on the train for such purpose, especially when the agent of the company in charge of the train sees the situation of such passenger, offers no assistance himself, and does not object to such assistance of the lady going upon the train. In such a case, the fact that the sudden jolting or jerking of the train on starting throws the man accompanying the lady, with a valise, against her and causes him to thus knock her upon the seat whereby she is injured, without fault on the part of either, does not relieve the company from liability. Macon, etc., R. Co. *v.* Moore, 108 Ga. 84, 33 S. E. 889.

In the case of Langan *v.* Iron, etc., R. Co., 72 Mo. 392, 3 Am. & Eng. R. Cas. 357, where a person was at a station helping off a friend with his trunk, it was held, that the company was bound to exercise as to him due care.

The plaintiff and his wife went to the defendant's depot as assistants as well as friends, in order to aid two old and decrepit persons whose business there was to take the defendant's train. The court said: "If the infirmities of passengers to go on the train required the assistance of friends to see them safely on board, servants or friends attending them for that purpose would clearly be in attendance at the depot under an invitation of the company as direct as that given to the passengers themselves, or to hackman who carry them to and from the station." Hamilton *v.* Texas and Pacific R. Co., 64 Tex. 251, 53 Am. Rep. 756, 757.

In Cherokee Packing Co. *v.* Hilson, 95 Tenn. 1, 31 S. W. 737, the plaintiff, a lady about 72 years of age, went with her daughter to the boat landing in the city of Memphis for the purpose of bidding her grandson good-by, who had taken passage on the defendant's steamboat. While standing on the gank plank, the plaintiff was injured by the careless and negligent manner in which the employees of the defendant were loading freight. It was held, that the plaintiff was en-

titled to recover, and that the carrier was under a duty of exercising ordinary care to prevent injury to such person, although on the premises merely to "speed the parting guest."

The Minority Rule Regarding Such Persons as Passengers.—In his work on Railroads, Judge Elliott says: "There is some diversity of opinion as to whether one who enters a train for the purpose of assisting a passenger is to be regarded as a passenger, and there are cases which seem to hold that such a person is a passenger. We are unable to assent to this doctrine as broadly held by some of the cases, for it seems to us that the extraordinary duty of a carrier to a passenger is not, as a general rule, owing to such person."

In the case of Railroad Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, it was held, that, where a passenger was so sick and enfeebled as to make it necessary for assistants to carry him from a station to a seat in the train upon which he had secured passage, the railroad company, having contracted to carry him with the knowledge of his condition, is bound to allow him the required assistants, and is under obligation to stop the train long enough to afford the persons aiding such passenger, although their services are voluntarily offered, a reasonable opportunity to leave the train, the same as if they were passengers.

If the father of an invalid daughter has an agreement with a railroad company that its cars will stop long enough for him to put her aboard the cars, and to alight therefrom in safety, the relation of carrier and passenger exists between him and the company, while he is assisting her on the cars and departing therefrom, and they owe him the highest degree of care. Evansville, etc., R. Co. *v.* Athon, 6 Ind. App. 295, 51 Am. St. Rep. 303, following Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 12 Am. St. Rep. 443.

But these two Indiana cases were impliedly overruled in Louisville, etc., R. Co. *v.* Espenscheid, 17 Ind. App. 558, 47 N. E. 186.

The supreme court of Arkansas in Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 29 Am. St. Rep. 48, 15 L. R. A. 434, criticises the Indiana rule as follows: "In the case of Louisville, etc., R. R. Co. *v.* Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, the supreme court of Indiana held that a railroad company owed the same duty to those assisting a passenger upon a train as to the passenger himself; but it cites no precedent for the ruling, and it is opposed to all cases adjudged upon the subject to which our attention has been called. The law exacts from railroads, for the protection of passengers, the highest degree of care, and imposes a liability for all injuries which sound judgment, skill, and the most vigilant oversight could have prevented; but this responsibility grows out of the relation or contract of carrier and passenger, on account of the great perils of the undertaking. As this is the cause and origin of the rule, it would seem that the rule should be restricted in its application to persons who come within that relation, and such is the effect of the authorities."

The Rule in the Stiles Case, 65 Ga. 370.—"While a person meeting his wife and child at the station of the carrier has all the rights of a passenger aboard the train for the purpose of receiving and assisting them from the train, and any injury received there and in the duty or desire of assisting them will be redressible at law, in the absence of negligence on his part, still where he is injured at a place other than the station to which he had gone for such purpose, by stepping from the car while it was still and not in motion, the carrier cannot be held liable for his injuries." Stiles *v.* Atlanta, etc., R. Co., 65 Ga. 370.

But in a later case it was said: "The dictum in Stiles *v.* Atlanta, etc., R. Co., 65 Ga. 375, to the effect that a person on board for certain purposes might have all the rights of a passenger, is (if law at all) to be restricted to persons who are on board with the knowledge of those agents or servants of the company whose diligence is charged with their safety." Coleman *v.* Georgia R. Co., 84 Ga. 1, 10 S. E. 498.

There can be no doubt that the Georgia rule is in accordance with the general rule stated above. See Southern Ry. Co. *v.* Merritt, 120 Ga. 409, 47 S. E. 908; Seaboard Air Line Railway *v.* Bradley, 125 Ga. 193, 54 S. E. 69.

General Rule as to Notice or Knowledge.—The authorities are virtually unanimous in holding that, unless knowledge that the plaintiff is on the train for the purpose of assisting others is communicated to the company's servants, no duty arises to hold the train for a reasonable time in order that such purpose may be accomplished. In such cases the duty is dependent upon the knowledge of the carrier, and the negligence upon the nonperformance of the ascertained duty. Without the presence of these constituent elements, liability, which is but the legitimate result of a known and nonperformed legal duty, cannot exist. Griswold *v.* Chicago, etc., R. Co., 64 Wis. 652; Coleman *v.* Georgia R. & Bkg. Co., 84 Ga. 1; Little Rock, etc., R. Co. *v.* Lawton, 55 Ark 428, 15 L. R. A. 454; Lucas *v.* New Bedford, etc., R. Co., 6 Gray 64, 66 Am. Dec. 642; Imhoff *v.* Chicago, etc., R. Co., 20 Wis. 344; Yarnell *v.* Kansas City, etc., R. Co. (Mo.), 18 L. R. A. 599, 601, Seaboard Air Line Ry. *v.* Bradley, 125 Ga. 193, 54 S. E. 69; Dillingham *v.* Pierce (Tex. Civ. App.), 31 S. W. 203; Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905.

"The duty of the company in such a case is relative, and not absolute. It seems to me that law would work in such a case the grossest injustice, if it could create a liability of the company. It would seem to be the first duty of the person entering a train for such a purpose to notify some one in its management of his presence, business, and purpose, so as to create some relation to the company, and make it its duty to care for him. The principle is elementary, in all such cases, that the liability of the company to a person injured by being in such a place of danger depends upon the company's failure to use ordinary care to avoid injuring him after becoming aware of his danger. Shear. & R. Neg. 36. Even a passenger must give the company notice when he leaves his proper place on the train in order to create a duty in the company to care for him out of such place. 2 Wood, Rys. 1134, 1135." Griswold *v.* Chicago, etc., R. Co., 64 Wis. 652, 26 N. W. 101, 103.

"Why should the managers of the train have held it there longer than to do the regular business at that place for this plaintiff to get off, when they did not know and had no reason to know that he was on the train. It would be unreasonable and reckless to hold that the company are required to stop their trains just so long at every depot, and that everybody has the right to depend upon the strict performance of this duty. If the train be behind time, that time must be made up or some collision might occur. The time must depend upon the business they are required to do safely with the persons to whom the company owes any duty. Beyond that there is no reason." Griswold *v.* Chicago, etc., R. Co., 64 Wis. 652, 26 N. W. 101, 104.

In one of the best considered cases we have on this subject, the court stated the rule as follows: "The duty is dependent upon the knowledge of his purpose by those in charge of the train; for without

such knowledge, they may reasonably conclude that he entered to become a passenger, and cause the train to be moved after allowing him a reasonable time to get aboard. The law could not, in reason or justice, impose as a duty the doing of that which, in the light of everything known to the trainmen, would not appear necessary or proper, nor hold that the cars should be stopped when there was no reason to stop them, except a fact unknown to them. If the attendant intended to become a passenger, he had no reason to ask a continued stop; and if he desired to get off, and that alone made a longer stop necessary, he could not expect or ask that it be made where no occasion for it was known to those in charge. Even where a passenger desires to stop at an intermediate station, he must make his desire known; and if he neglect this, he cannot complain if he is carried past his station: Griswold *v.* Chicago, etc., R'y Co., 64 Wis. 652; Coleman *v.* Georgia R. R. Co., 84 Ga. 1. If such notice is required of passengers, it should, with at least equal reason, be exacted of others, and we are of opinion that it is essential to fix a duty in that regard." Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 29 Am. St. Rep. 48, 52.

The annotator of Lawyers' Reports Annotated (volume 15, p. 434), in considering cases involving the duty of a carrier to persons entering a vehicle to assist a passenger, says: "So far as any rule has been evolved by the few reported cases, it seems to be one founded on the fact of notice to agents of the company of an intention to enter the vehicle, and return again to the station platform. In case such notice is given, there is a tendency to hold the carrier to the exercise of ordinary care not to injure the assistant; while in case there is no such notice, either actual or constructive, it seems that the company owes no duty to such person." We have examined all the authorities on the subject accessible, and believe the rule quoted, so cautiously and carefully stated, fully sustained by them. Quoted in International, etc., R. Co. *v.* Satterwhite, 5 Tex. Civ. App. 102, 38 S. W. 401, 402.

Instructions.—When one assists a passenger aboard a train at a station, intending not to become a passenger himself, but to leave the train after helping the passenger on the cars, no duty arises to hold the train for a reasonable time in order that such purpose may be accomplished, unless knowledge of such purpose is communicated to the company's servants. An instruction to the effect that a railroad company is bound to use ordinary diligence to ascertain the purpose of a person boarding its cars is erroneous, as placing a burden on the company which the law does not impose. Seaboard Air Line Ry. *v.* Bradley, 54 S. E. 69; Coleman *v.* Railroad Co., 84 Ga. 1, 10 S. E. 498; Hill *v.* L. & N. R. Co., 124 Ga. 243, 52 S. E. 651; Yarnell *v.* Railroad Co. (Mo. Sup.), 21 S. W. 3, 18 L. R. A. 599.

It was held error in Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905, to refuse to give the following special charge: "You are instructed that, though the plaintiff had the right to go on the train in question to assist his wife in procuring a seat, yet you are instructed that when he did so he was required to take notice of the time that the train would leave, unless he gave notice to the conductor in charge of the train of his purpose and desire to get off the train after having procured a seat for his wife. Hence, if you believe from the evidence that the plaintiff entered the train in question, and that when he did so he failed to give the conductor in charge of the train notice of his purpose and desire to get off the train after seeing his wife seated, and that the train stopped at Itasca the usual length of time before starting, and that after the lapse of such time, and

after the train started, plaintiff attempted to alight from the train in question, and as a consequence was injured, you will find for the defendant."

Cases Applying the General Rule as to Notice.—There can be no doubt that a female holding a ticket entitling her to transportation as a passenger on a railroad train, if feeble, or encumbered with heavy baggage or other impediments, is entitled to have assistance in boarding the train, and if the same is not afforded by the railroad officials or servants, her husband or other escort may render her the necessary assistance, and for this purpose is entitled to enter the train, and is entitled to a reasonable time to leave the train before it is put in motion, if accompanied with the proviso that the defendant or its agents have notice of the purpose for which such person enters the train. Johnson *v.* Southern R. Co., 53 S. C. 203, 69 Am. St. Rep. 849, 851.

Where a person not a passenger escorted a lady friend onto the cars, and to find her a seat, returned to the platform, and was thrown therefrom by the motion of the train and injured, he was not allowed to recover, and one reason given was that no one of the employees had any notice of his being on the train. Railroad Co. *v.* Letcher, 69 Ala. 106. The court says, in the opinion: "All who were in charge of it (the train) were ignorant that the plaintiff was upon it, and without notice or request to any of them to slow or stop the train," etc.

Evidence to Prove Notice or Knowledge.—"The fact of his getting on the train, carrying a valise and accompanied by his daughter, would certainly not be calculated to give notice that he intended to get off again." Dillingham *v.* Pierce (Tex. Civ. App.), 31 S. W. 203, 206.

Where, in an action for personal injuries sustained by plaintiff in getting off a moving train which he had boarded for the purpose of assisting a passenger, it appears that the train moved at the signal of a brakeman, evidence that the brakeman ordered plaintiff to get off is admissible for the purpose of showing that those in control of the train knew of plaintiff's intention to get off. International, etc., R. Co. *v.* Satterwhite, 5 Tex. Civ. App. 102, 38 S. W. 401.

Whether a person who attended a child in boarding a street car on a particular occasion, for the purpose of placing upon the car small packages which the child was to have in charge, had frequently before done the same thing at the same place when the same driver of the car was on duty, is admissible evidence as tending to show that the person on this particular occasion intended to get off after depositing the packages, as she had done on the previous occasions, and did not intend to remain on board so as to justify the driver in starting the car suddenly while she was engaged in getting off. It being the duty of the driver (there being no conductor) to take notice of all persons entering the car, his knowledge that the plaintiff did enter it in this instance might be inferred; and, if he knew that she had withdrawn from the car and alighted in numerous previous instances under like circumstances, it could be inferred that he knew or ought to have known that such was her intention on the occasion in question. The court erred in excluding evidence of the previous instances, and consequently in granting a nonsuit. Houston *v.* Gate City St. R. Co., 89 Ga. 272, 15 S. E. 323.

Contributory Negligence to Leap from Moving Train.—But whether the defendant company has performed its duty to such a person or not, it is such contributory negligence as will bar a recovery, for the plaintiff to leap from a rapidly moving train. Dillingham *v.* Pierce

(Tex. Civ. App.), 31 S. W. 203; Louisville, etc., R. Co. *v.* Espenscheid, 17 Ind. App. 558, 47 N. E. 186

In Central Railroad and Banking Co. *v.* Letcher, 69 Ala. 106, 44 Am. Rep. 505, the court in denying relief to one who entered a railway train as an escort for a woman to find her a seat, and who was injured in the endeavor to leave the train while it was under way, uses the following convincing language: "The only injury which could have resulted to the plaintiff, from the neglect to give the signals for the departure of the train, was the inconvenience of being carried from his home, the loss of time and the labor or expense of returning. These were the immediate, direct consequences of the neglect. To avoid them he was not justified in putting in jeopardy life or limb; and if he should, and other injury result, the compensation he can rightfully demand is not increased. What would have been his rights, if there had been the presence or pressure of impending peril of personal injury, and to avoid it, he had leaped from the train; or what would have been his rights, if under the advice, direction or command of an agent or employee of the defendants, he had left the train as he did, are not questions now for consideration. In the absence of such peril, or of such advice, direction or command, or of some other circumstances, lessening the carelessness of the act, or giving to it the color of necessity, leaping from a moving train by all the authorities is esteemed negligence, debarring a recovery because of the prior negligence of the servants or agents of a railroad company."

One entering the cars of a carrier of passengers, not as passenger, but to accompany infirm relative to a seat as a passenger, cannot recover for injuries received in leaving the cars, if he attempted to leave the cars after the train was started, or finding the cars in motion as he was going out, persisted in making progress to get out, and if such attempt was the cause of or contributed to the accident, even though there was negligence in the carrier in moving the train and in a jerk occurring after the starting, which concurred in producing the injury. Lucas *v.* New Bedford, etc., R. Co., 6 Gray, 64, 66 Am. Dec. 406.

Rule Where Employees Render Necessary Assistance.—Where the railway employees upon a train offer all necessary assistance to a passenger, his escort has no right to enter the cars merely as an escort, and the carrier owes the latter no duty, except to refrain from willful or wanton injury to him. Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 29 Am. St. Rep. 48, 15 L. R. A. 434. See Johnson *v.* Southern R. Co., 53 S. C. 303, 69 Am. St. Rep. 849.

Notice Forbidding Strangers to Enter Cars.—A notice that all persons not having business with a railway company are positively forbidden to enter any of its cars, does not apply to a person who attends a passenger to render necessary assistance. Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 29 Am. St. Rep. 48, 15 L. R. A. 434.

Notice of Starting of Train.—The carrier is not bound to give such person any special notice of the time of the departure of the train. Lucas *v.* New Bedford, etc., R. Co., 6 Gray (Mass.) 64, 66 Am. Dec. 406.

"We should be very reluctant to hold, that an aged or infirm mother, or sister, or wife, or indeed any other woman, especially if incumbered with an infant child, should not be allowed the assistance of a male friend or relative in getting a seat upon a railroad car, and that such friend or relative was to be treated as a mere stranger to the company, having no claim upon the company for an injury under any circum-

stances. Not being a passenger, it is conceded that no extraordinary care was required; but whether the neglect of customary signals would not amount to ordinary negligence is a matter upon which the Massachusetts decision is not satisfactory." Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371, 376.

Plaintiff went on board defendant's railroad train, not as passenger, but to find seats for a lady and child whom he had in charge. After finding the seats he attempted to get off the train and in so doing was injured. Held, that even though he got off after the train was in motion, yet if sufficient notice of the start and a reasonable time to get off were not given, the company was liable. "The plaintiff was entitled to have sufficient time to escort the lady under his charge to her seat, and then leave the cars. If the time was not enough, or if the defendant's agents failed to give notice of the starting of the train, by the usual signals, of an oral cry of 'all aboard' from the conductor, and the ringing of the bell by the engineer, it was not such ordinary care as the defendant was bound to exercise, both toward passengers and persons in the situation of plaintiff. And these questions of fact were, therefore, properly submitted to the jury by the court." Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371, 377.

Length of Time to Be Allowed Such Person to Alight—The rule as to the length of time the carrier should stop to allow such licensees to get off is variously expressed as a "reasonable length of time," "a sufficient time," "usual time," etc., but, of course, this must depend largely upon the surrounding circumstances, such as the age and activity of the plaintiff, whether crippled or not, the place where the stop is made, etc. Dillingham *v.* Pierce (Tex. Civ. App.), 31 S. W. 203; Louisville, etc., R. Co. *v.* Espenschild, 17 Ind. App. 558, 47 N. E. 186; Johnson *v.* Southern R. Co., 53 S. C. 303, 69 Am. St. Rep. 849; International, etc., R. Co. *v.* Satterwhite, 15 Tex. Civ. App. 102, 38 S. W. 401.

In Louisville, etc., R. Co. *v.* Espenscheid, 17 Ind. App. 558, 47 N. E. 186, it was held, that no general rule could be laid down as to the length of time which the train should stop. The rule is that it should stop a reasonable time, and this must be controlled and adjudged by the conditions, circumstances, and surroundings in each particular instance. "For instance, a longer time would be required where there are many passengers to alight than where there are but few; in a dark night, with the landing places badly lighted, than where there is full light; at a difficult place to alight, than where it is easy." "We know, as a matter of common experience and knowledge, that in the space of three minutes many passengers can leave a train, and many enter it, in perfect safety. We also know that three minutes is an unusually long time for a train to stop at an intermediate station to discharge and take on passengers. We further know, by observation and common knowledge, that an ordinary passenger coach is about 60 feet long, and that a person in three minutes, even at a slow gait, could walk at least five times the length of such car."

"Persons entering the cars, who are not passengers, and without the request or instance of the company, are bound to know the time of departure (if such time be fixed, and reasonable public notice given thereof), and to leave the cars in such season before the time so fixed, as would enable them to get off with care, before the cars are set in motion. With the arrival of the time fixed for the departure of the cars, the implied license or permission ceased, and with it the liability of the defendant, except in case of misfeasance or gross negligence." This was said in a case where a lady had conducted and

assisted into the cars, her aunt who was aged and infirm, and affected by disease of the heart and unable to enter the cars without assistance, and upon leaving and attempting to step on the platform after the cars had commenced moving, was precipitated under the wheels, and her arm and leg severed from her body. The court held that she had no cause of action, upon the ground that she was on the cars merely by license or permission, and because in such case she attempted to leave the cars after they were put in motion. Whether the usual signals for leaving had been given or not was treated as an inquiry of no importance, on the ground that the lady (plaintiff) was where she had no right to be—that was, on the steps of the car. Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371, 376.

In Griswold *v.* Railroad Co., 64 Wis. 652, 26 N. W. 101, a husband went to the station on a dark morning, about 4 o'clock, to meet his wife. When the train stopped he boarded it to assist his wife in alighting, but he missed her, she going out at another door from where he entered. He passed through one sleeper, and was on his way to enter another, when the train suddenly started, and he was injured. There was no showing that his wife needed any assistance, and he boarded the train without the knowledge of any of the trainmen. All the passengers who desired to do so had left the train, and all seeking passage had entered. It was held, that he was not a passenger; that, under the facts, the company owed him no duty; and that he could not recover.

In Johnson *v.* Southern R. Co., 53 S. C. 303, 69 Am. St. Rep. 849, 852, the evidence was that the train, being behind time, stopped for a very short time—about half a minute, as one of plaintiff's witnesses estimated; and if the conductor had started his train after such a very short time, and was then notified that the plaintiff desired to get off the train, he could and should have stopped his train, to enable this old man, sixty-five years of age, to get off the train, especially as the testimony tended to show that the train had not stopped long enough to allow the plaintiff time to get off before it started.

Care Required as to Safety of Premises.—It is well settled that a railroad company is bound to keep its station platforms and the approaches safe for persons who are on the premises to welcome the coming or speed the parting guests. Hamilton *v.* Texas & Pacific R. Co., 64 Tex. 251, 53 Am. Rep. 756; Lucas *v.* New Bedford, etc., R. Co., 6 Gray (Mass.) 64; Keokuk Packet Co. *v.* Henry, 50 Ill. 264; Doss *v.* Missouri, etc., R. Co., 59 Mo. 27; Langan *v.* St. Louis R. Co., 3 Am. & Eng. R. Cas. 355; McKone *v.* Michigan Central R. Co., 13 Am. & Eng. R. Cas. 29, 57 Mich. 601, 47 Am. Rep. 596; Railway Co. *v.* Best, 66 Tex. 116, 18 S. W. 224; Railway Co. *v.* Brown, 78 Tex. 398, 14 S. W. 1034; Texas, etc., R. Co. *v.* Reich (Tex. Civ. App.), 32 S. W. 817, 819; Dillingham *v.* Pierce, Tex. Civ. App., 31 S. W. 203; Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. De 317; Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905.

Where such person is injured by a defective platform it is error to charge that, if plaintiff knew that the platform was defective, but it was "necessary" for him to use the defective part, he can recover, when the evidence merely shows that the plaintiff was proceeding in that direction in answer to a supposed call from some one. Texas, etc., R. Co. *v.* Best, 66 Tex. 116, 18 S. W. 224.

In the case of Tobin *v.* Portland, etc., R. Co., 59 Me. 183; S. C., 7 Am. Rep. 415; where a hackman who was accustomed to carry passengers to and from a railroad depot was injured by a defect in the

platform, he was held entitled to recover on the ground that he was there by the license and permission of the railroad company, and by the accommodation afforded by him to travelers actually contributed to help the company's business.

See note appended to Little Rock & Fort Smith Railway *v.* Lawton, 15 L. R. A. 434.

HAMMER *v.* COMMONWEALTH.

Sept. 19, 1907.

[59 S. E. 400.]

1. Writ of Error—Dismissal—Moot Question.—It appearing, in a quo warranto proceeding involving the right to the office of judge of election, that since the writ of error was awarded the issue has become extinct by the term of office in question expiring, the case must be dismissed.

2. Same—Moot Questions—Dismissal of Cause.—Where it appears there is no actual controversy between litigants, or that, if one existed, it has ceased, a court should dismiss the cause, since it is not their office to give opinions on abstract propositions of law, nor to decide questions upon which no rights depend.

[Ed. Note.—For cases in point, see Cent Dig. vol. 3, Appeal and Error, § 3122.]

Error to Circuit Court, Alleghany County.

Quo warranto by the commonwealth against one Hamer and others. From the judgment, defendant Hamer brings error. Dismissed.

Geo. A. Revercomb and *John T. Delaney,* for plaintiff in error.
The Attorney General, for the Commonwealth.

HARRISON, J. This quo warranto proceeding was instituted in September, 1906, by the attorney for the commonwealth, of Alleghany county, to have determined a conflict between certain parties claiming to be judges of election for the Second Ward in the town of Covington.

The plaintiff in error, together with two others, was appointed judge of election for said Second Ward by the electoral board for the county of Alleghany; and their contestants, three in number, were appointed to the same office by the council of the town of Covington. The circuit court of Alleghany county held that those persons appointed as judges of election by the council of the town of Covington were entitled to hold the office and discharge its duties. To that judgment this writ of error was awarded October 8, 1906, upon the petition of one of the parties who had been appointed by the electoral board.